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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

INTERMODAL BRIDGE TRANSPORT, Employer and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party	**Case Nos. 21-CA-157647** **21-CA-177303**

CHARGING PARTY'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS AND THE CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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I. Introduction

Intermodal Bridge Transport ("IBT" or "Respondent") has been misclassifying its drivers since at least 2008 when it began its current business model. In 2014, IBT's drivers began to challenge their misclassification and engage in protected concerted activity. By April 2015, over half of them had signed a petition affirming their status as employees and demanding to be represented by the Union. (GC Exh. 2, 3). In response, IBT reaffirmed their misclassification by engaging in "a pattern of attempting to manufacture a record that would color the facts in its favor," (ALJD 10), and committed other ULPs aimed at quashing the organizing campaign.

Administrative Law Judge Dickie Montemayor ("ALJ") properly found that IBT's drivers were statutory employees and that IBT committed multiple ULPs. Charging Party's March 16, 2018 cross-exceptions, however, demonstrate that the ALJ erred by failing to find that IBT violated the Act by suspending and/or discharging Eddie Osoy ("Osoy") and through statements made by Safety Coordinator Vicky Rosas' ("Rosas"). Respondent's April 27, 2018 answer to these cross-exceptions (and to the GC's exceptions) relies on inherently suspect witnesses, misstates the facts in the record, misstates the caselaw it cites, and fails to rebut the GC's or Charging Party's arguments. Respondent's mischaracterizations and omissions should be rejected as part of its effort to manufacture evidence in its favor. Charging Party thus requests that the Board find merit in its cross-exceptions and reject IBT's Answer.

II. Argument

A. Respondent Inappropriately Addresses and Grossly Misstates the Record Evidence Related to Business Structure and Employee Status

Much of Respondent's brief re-hashes (and misstates) the evidence related to its business structure and drivers' employee status, even though those facts fall outside the scope of Charging Party's Cross-Exceptions and the GC's Exceptions. While Charging Party cannot similarly re-

hash these facts because of space restrictions, Charging Party incorporates by reference the facts from both its Cross-Exceptions and its Answering Brief in response to Respondent's exceptions.

Respondent did misrepresent or misstate certain notable facts. To begin, IBT made the business decision that it would be advantageous to retain the drivers who were already working for it when the clean truck program was instituted. It obtained 50 trucks on a long term lease to allow it to keep these drivers, and it provided the trucks free of charge to its drivers through the Staffmark agency. (Tr. 1685-88, 2076-77; 4126-27; 3929-30). Deciding this was too expensive, IBT later made the unilateral business decision to begin forcing its drivers to pay rent for the trucks they were already using through Staffmark, and to force drivers to pay the exact amount that would offset IBT's own long-term lease of these trucks. (Tr. 2081-83, 2106-08, 3936-37).

Although IBT began referring to these drivers as "independent contractors" and forcing them to sign agreements identifying them as such, "the work drivers performed did not substantially change. In fact, the driving that was done by the drivers as Staffmark employees was identical to the work performed by drivers under IBT's new model." (ALJD 4; Tr. 114-15; 631-34; 1304; 3114-15). The only difference was that IBT began requiring that drivers pay for the truck and other expenses if they wanted to retain their jobs at IBT, which most drivers did.

IBT's decisions and its actions in structuring its working relationship with drivers gave it exactly what it desired—a long-term, stable workforce that worked exclusively for IBT for years on end, that completed the very core of IBT's business, that did not have the tools or operating authority to operate on their own, that did not advertise their services or seek work from sources outside of IBT, and that was thus bound to follow IBT's various work rules and regulation, including being subject to IBT's progressive discipline policy. (*see e.g.* ALJD 4-20; GC Exh. 54, 70, 80, 81, 84; U. Exh. 26, 27, 36; Tr. 196-97, 285-86, 512-13, 630-31, 663-64, 697-98, 932-33,

962-64, 1090-91, 1134-35, 1388-90, 1445-48, 1609, 1695-98, 1807-08, 1823-24, 1857, 1962-69, 1994-97, 2874-75, 2933, 2974-76, 3076, 3094-96, 3255, 3262-64, 3786-87, 3859-60, 3873-74).

B. Respondent Violated the Act by Terminating and/or Suspending Osoy

1. Osoy Did Not Threaten Jose Molina

Respondent places great emphasis on its assertion that the GC's witnesses were not present at the beginning of the interaction between Osoy and Jose Molina ("JMolina"), ignoring that this does not detract from the value of the drivers' testimony. Both Jose Portillo and Pedro Miranda approached Osoy and JMolina soon after they heard that an altercation had begun (Tr. 716, 973). They were both present for key parts of the conversation: they both heard Osoy mention going outside, but never heard anything regarding fighting. Miranda corroborates that Osoy only wanted to go outside to "talk about the problem and fix it." (Tr. 975). Portillo also confirms that "there was never a threat, nor affirmation that they were going to fight." (Tr. 952).

In fact, JMolina was the only person to testify that Osoy said anything directly about fighting, going as far as claiming that Osoy threatened to fight all the drivers gathered around them. (Tr. 2814-16). Yet, surprisingly, no other driver testified about Osoy making such threats. IBT also did not testify that any other driver reported or complained about Osoy's alleged threats. In fact, JMolina himself admits that he did not take Osoy's alleged threat seriously and that he only reported it to IBT to counteract the fact that he believed Osoy would report to the Union. (Tr. 2820-21). In light of this, the ALJ should have found that there was insufficient evidence to find that Osoy threatened to fight either JMolina or the other gathered drivers.

2. ALJ Properly Found That GC Established a Prima Facie Case

Respondent's answering brief relies on mistaken and overbroad readings of the two cases it cites to argue that the GC did not establish a prima facie case because it did not prove a causal connection between the adverse action taken against Osoy and Osoy's protected activity.

Gold Coast Restaurant Corp., 304 NLRB 750, 751 (1991) does not stand for the proposition that because some employees who engage in protected activity are not subject to adverse action, other employees engaging in such activity who are punished are not victims of an 8(a)(3) violation. (Resp. Ans. Brf. at 16). In fact, in *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004), the Board reiterated that "it is well established that an employer's failure to take adverse action against all union supporters does not disprove a discriminatory motive, otherwise established, for its adverse action against a particular union supporter."

Further, the Board's analysis in *Gold Coast* was based on whether *knowledge* of union activity could be inferred, not on whether a causal connection could be inferred. Here, "it is undisputed that the Employer was aware of Osoy's Union activity." (ALJD 28). Similarly, while the Board in *Gold Coast* opined in dicta that it may sometimes consider a lack of adverse action against other individuals, this factor is not decisive. The Board never stated that the lack of punishment of other individuals negates an inference that specific adverse actions were motivated by Union activity. Instead, if anything, this is just one in many factors to consider. In *Gold Coast,* for example, the Board considered the fact that other individuals were subject to adverse action without engaging in protected activity and that there was no evidence of disparate treatment. These facts distinguish *Gold Coast* because Osoy was the only individual subject to adverse action in our case *and* there is clear evidence of disparate treatment (described below).

Respondent's citation to *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011), is likewise inapposite. Respondent incorrectly cites this case for the proposition that a suspension occurring a month after an employer learned of protected, concerted activity defeated any inference of causation. In *Camaco*, the ALJ found that the Employer *did* violate the Act by suspending an employee because of his union support. The ALJ first considered the fact that the Employer

learned of protected activity over a month before any alleged adverse action. While recognizing that timing alone may not always be sufficient to infer an improper motive, the ALJ explicitly stated that "[i]n some instances, even a delay of this length will not render it inappropriate to infer unlawful motivation from the timing." *Id.* at 1194. Specifically, other manifestations of animus by an employer would make it possible to infer an improper motive, even in light of some temporal distance. *Id.* As such, the ALJ considered when the employer learned of protected concerted activity, other protected activity closer to the discipline, the employer's violations of the Act, and the employer's animus, all pointing toward a finding that "protected activities were a substantial and motivating factor in Respondent's decision to suspend him." *Id.* at 1195.

A similar finding is appropriate in this case. Osoy had engaged in open union activity consistently since the organizing began, including appearing in a prominent newspaper article a mere three days before his suspension. (*see* GC Exh. 5). Further, IBT's claim that Osoy's "relationship with IBT remained intact and largely uneventful" since Osoy went public is an outright lie—the ALJ found that IBT unlawfully interrogated Osoy, threatened Osoy, and even promised Osoy benefits to abandon the Union. (ALJD 30). Similarly, the other violations of the Act found by the ALJ also support a finding of an improper motive. (ALJD 29-30). Finally, various emails in the record unequivocally demonstrate Respondent's extreme animus against the Union and its "goons." (*see* GC Exh. 126-37, U. Exh. 38, U. Exh. 37). Thus, it was proper for the ALJ to infer from all these facts that the adverse action against Osoy was motivated by his protected activity and that the GC therefore met its initial burden under *Wright Line*.

3. IBT's Treatment of Osoy Demonstrates that IBT's Stated Reasons for the Adverse Action Were Nothing More than Pretext

As extensively discussed in Charging Party's Brief in Support of its Cross-Exceptions, the ALJ should have found that IBT could not rebut the prima facie case under *Wright Line*

because IBT's proffered reason for the action was mere pretext for its unlawful motives. This finding of pretext is supported by the evidence demonstrating that:

> (1) IBT intended to permanently discharge Osoy when it removed him from the IBT yard with two armed guards; (2) IBT chose the most public and humiliating method of removing Osoy, when it had other options, in order to chill Section 7 activity; (3) the ALJ incorrectly weighed Osoy's corroborated testimony and Molina's uncorroborated testimony regarding this incident; (4) IBT failed to conduct a meaningful investigation into this incident; and (5) IBT's actions against Osoy were more severe than any action taken against other drivers who engage in similar conduct.

see CP Brf. ISO Cross-Exceptions at 32-51. Rather than restating the argument set forth in its cross-exceptions brief, the Union will focus on the differences between how Osoy was treated and how other drivers who engaged in similar conduct were treated.

The first pertinent instance of disparate treatment involves driver Anthony Patterson, who confronted and physically assaulted a picketer. (GC Exh. 89). Respondent at no point provides any rational explanation for why it contacted that driver at home to inform him not to show up at the jobsite the following day and to request his statement of the incident, when it failed to take either of those steps with Osoy. (Tr. 1928-34). Instead of calling Osoy at home, IBT orchestrated it so that it could have two armed guards escort Osoy off IBT property at the exact time when the most other drivers would be at the yard to witness this chilling incident. (Tr. 227-33, 269, 527). Further, rather than request a statement from Osoy like it did from Patterson, Safety Director Bradley admitted that he refused to even listen to Osoy's version of events and that he just wanted Osoy out of IBT's yard. (Tr. 231, 1916). IBT never even obtained a written statement from JMolina, or from any of the other drivers who Osoy allegedly threatened or who otherwise witnessed the incident. (Tr. 531, 731-35, 976-79, 1926, 1939, 2826-29).

The difference in how IBT treated Osoy as compared to Patterson, and IBT's utter lack of any real investigation, can only be attributed to the fact that IBT had an improper motive for

taking adverse action against Osoy. If IBT's true goal was to maintain peace at the yard and investigate the incident, it would have treated Osoy like it did Patterson. It would have contacted Osoy at home, it would have told Osoy not to show up at the IBT yard, it would have requested a written statement from Osoy, it would have followed up with Osoy and spoken with other witnesses during its investigation, and, if necessary, it would have set up an off-site meeting when it actually terminated Osoy. IBT's failure to take any of those steps—and its decision to have two armed security guards treat Osoy like a criminal in front of dozens of his coworkers—can only be seen as an attempt by IBT to ensure Osoy was publicly humiliated and to deter other drivers from engaging in the same type of protected activity Osoy engaged in.

Respondent attempts to distinguish the second case of a driver who damaged company property as not involving a threat. (Resp. Ans. Brf. at 18). This argument fails, however, because IBT's own email describes the driver as "very aggressive and combative" and states that the driver in questions threatened to reach through the dispatch window to "get" the dispatcher. (U. Exh. 27). Thus, even assuming Osoy did threaten JMolina, the threat made by the driver who also caused property damage is undoubtedly as serious as any threat that Osoy was alleged to have made. Yet, it does not appear that this driver was removed from work or told not to come in or marched off the property by two armed guards—at most, IBT made him pay for the property damage he caused while ignoring his aggressive, combative threats. (Tr. 3960, 3993, 3965-66; R. Exh. 88, U. Exh. 27). Similarly, even after Osoy reported that JMolina "is part of a group of drivers who are always insulting, intimidating, and threatening Union supporters," IBT failed to take any action against JMolina. (GC Exh. 6). IBT's disparate treatment of these other threatening and aggressive drivers demonstrates that in Osoy's case, his Union and protected concerted activity was the true motivation for IBT's dramatic and adverse actions against him.

C. Respondent Violated the Act through its agent Vicky Rosas

1. Vicky Rosas Is an Agent of IBT

Respondent improperly argues in its answering brief that Vicky Rosas ("Rosas") was neither a supervisor nor agent of Respondent.[1] Nonetheless, were the Board to consider Rosas' status, the record supports the ALJ's finding that Rosas was an agent of Respondent and that her statements with regard to hiring, firing, and discipline can be attributed to IBT.

Respondent rests its entire argument on the mistaken assertion that "neither the General Counsel nor the Charging Party introduced any evidence or material which would establish that IBT ever made any manifestation to Rosas's coworkers which would lead them to reasonably believe that she was acting as an agent of IBT." (Resp. Ans. Brf. at 29). The record, however, is replete with the type of manifestations by Respondent that would lead any reasonable employee to believe that Rosas spoke and acted on behalf of IBT. An individual's "title and the nature of their duties alone" may be sufficient to infer "that they were vested with the powers of general agents of the Respondent." *Newspaper & Mail Deliverers of New York*, 90 NLRB 2135, 2144 (1950). Here, IBT gave Rosas the title of "Safety Coordinator." (Tr. 3448). This title alone is sufficient to indicate that Rosas has greater managerial authority than an ordinary employee—she is at a higher level and can thus speak on behalf of IBT in connection with that authority.

IBT's manifestations did not end there. IBT imbued Rosas with authority by having her undertake certain tasks on behalf of IBT. It gave Rosas responsibility for onboarding new drivers and assisting them with the agreements and other paperwork required by IBT. (Tr. 1681, 3439-

[1] Respondent's failure to limit its answering brief to matters raised in Charging Party's cross-exceptions or the General Counsel's exceptions, and its failure argue in support of its own exceptions in its supporting brief, means that Responded has waived these arguments and exceptions. (*see* Resp. Ans. Brf. at fn. 16, fn. 24; NLRB Rule 102.46 ("Any exception . . . which is not specifically urged will be deemed to have been waived")).

3442). It gave her responsibility for administering the entry level driver test, and for the initial review of an applicant's driving record, medical card, and prior hours of service. (Tr. 3482-89). It made her a "liaison between IBT and the drivers for matters such as handing out settlement checks, drug testing, collecting and monitoring log books, and obtaining the drivers signatures on weekly contracts with IBT." (Jt. Exh. 2). Significantly, IBT gave Rosas authority over matters relating to discipline and terminations. When Osoy was suspended for failing to turn in his logs as required by IBT, dispatch directed Osoy to contact Rosas to find out why he was out of service. (Tr. 210). Rosas also told Osoy that if he did not include meal breaks on his logs—even when he did not actually take a meal break—he would be suspended. (Tr. 254). After removing Osoy, IBT even had Rosas contact Osoy to offer him his final paycheck and escrow check in exchange for Osoy signing a document stating he was leaving IBT. (Tr. 270-71).

A reasonable employee would be compelled to draw the conclusion that Rosas spoke and acted on behalf of management because IBT gave Rosas the coordinator title, and instructed her to participate in the managerial tasks of hiring, disciplining, and terminating drivers. In fact, an employee could theoretically be onboarded by Rosas, only speak to Rosas when there are issues with his logbooks or weekly contracts, and then only speak to Rosas when he is terminated and given his final paycheck and escrow check. Rosas' primary role as point person in these critical aspects of the drivers' working relationship make Respondent's argument nonsensical.

2. The ALJ Should have Credited Osoy's Testimony and Found that Rosas' Statements Violate the Act

Although the ALJ appears to have credited Rosas' testimony, the clear preponderance of the evidence does not support this credibility determination. The ALJ himself found that IBT consistently acted dishonestly in an effort to manufacture evidence that would support its case—including with regard to the documents that drivers were required to fill out during the

onboarding process. (ALJD 10). Rosas' role in this dishonest onboarding, and her demonstrable animus towards the Union, are strong indicators that Rosas' testimony should be given little weight.[2] As described by Osoy, at a previous meeting, Rosas stated that "she would be in charge of firing the drivers that were in the Union." (Tr. 208). Although Respondent claims that Rosas was not present at the meeting where she allegedly made this statement, (Resp. Ans. Brf. at 25), Joe Ortiz confirmed that Rosas was present and that she made the comment about firing the four drivers who were wearing union vests at the meeting. (Tr. 521-22). These facts calls for a finding that the ALJ improperly credited Rosas' testimony over Osoy's testimony.

If the ALJ had properly credited Osoy, there would be no question that Rosas' comment to "be careful because [IBT] was recording [] and listening" would create an unlawful impression of surveillance. *See In Re Woodcrest Health Care Ctr.*, 360 NLRB 415, 416 (2014) (finding that "watch [his] back, be careful" created an unlawful impression of surveillance despite the open nature of the individual's protected activity) *affirmed in part, vacated in part by 800 River Road Operating Co. LLC v. NLRB*, 784 F.3d 902 (2016) (affirming NLRB's finding regarding an unlawful impression of surveillance as "supported by substantial evidence"); *Fluid Packaging Co.*, 247 NLRB 1469, 1473 (1980) (finding that statement to "be careful" because employee was "being watched" created an unlawful impression of surveillance).

III. Conclusion

For the above reasons, and for the reasons further elaborated in Charging Party's Brief in Support of Cross-Exceptions, the Board should reject Respondents' arguments and should find merit in Charging Party's Cross Exceptions, reversing the ALJ's findings where necessary.

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[2] Especially when we consider the fact that Osoy's testimony, which directly contradicted his supervisors, should be seen as particularly reliable. *Flexsteel Indus.*, 316 NLRB 745 (1995).

DATED: May 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS AND THE CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on May 11, 2018.

A copy of the of the **CHARGING PARTY'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS AND THE CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was also served upon the following by electronic mail on May 11, 2018.

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